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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHARLES BENJAMIN MAPES, Appellant.	2 CA-CR 2009-0160 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074672

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Charles Mapes appeals from his convictions and sentences for two counts of theft of a means of transportation and one count of fraudulent scheme and artifice. He

argues that insufficient evidence supported his conviction for fraudulent scheme and artifice and that the trial court improperly instructed the jury. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In May 2007, Mapes presented identification and asked to test-drive two vehicles at the Cactus Auto dealership. After the salesman provided him with keys to both vehicles, Mapes left in the first vehicle and returned about an hour later. He then left in the second vehicle. When he did not return by the end of the business day, Cactus Auto reported the vehicle stolen. Police officers located the vehicle that evening and found the key to the first vehicle and a wallet containing Mapes's identification inside.

¶3 On November 6, 2007, Mapes went to Drivetime Automotive, filled out an application to purchase a car, and presented identification. The salesman told Mapes that he would drive the vehicle on a test-drive because Mapes had not presented a driver's license. After the salesman started the vehicle, he went inside to get a license plate. When he returned, Mapes and the vehicle were gone. A Drivetime employee called the police to report the vehicle was stolen. It was found about a block from Mapes's mother's address a few days later. The keys never were found.

¶4 On November 26, 2007, Mapes and his girlfriend went to Cowboy's Auto Sales and asked about purchasing and financing a vehicle. When Mapes asked to test-drive a vehicle, the salesman told him he would have to be pre-qualified by the owner of

the business and that he or the owner would accompany Mapes on the test-drive. At Mapes's request, the salesman unlocked and started a vehicle while they waited for the owner. Mapes and his girlfriend drove the vehicle out of the sales lot with the door open and the salesman chasing them and yelling. The salesman reported the vehicle was stolen and, within a few minutes, a police officer located and stopped Mapes. His girlfriend was still in the vehicle with him, along with additional passengers.

¶5 Mapes was charged with three counts of theft of a means of transportation and one count of fraudulent scheme and artifice. A jury found Mapes guilty of all counts except the May 2007 theft. The trial court sentenced Mapes to concurrent terms of imprisonment, the longest of which was 10.5 years for the fraudulent scheme and artifice conviction.

Discussion

Rule 20 Motion

¶6 Mapes contends the trial court improperly denied his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P. "[W]e conduct a de novo review of the trial court's decision [on a Rule 20 motion]." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). Our review is deferential, however, because we "view[] the evidence in a light most favorable to sustaining the verdict[s]." *Id.* A trial court must grant a Rule 20 motion "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009). Substantial evidence is that which reasonable minds could consider sufficient to establish the defendant's guilt beyond a reasonable doubt. *State v.*

Spears, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶7 Mapes contends the evidence was insufficient to support his conviction for fraudulent scheme and artifice because the state had failed to show that he had used a false pretense in order to take the cars. Under A.R.S. § 13-2310(A), a person commits a fraudulent scheme and artifice by "knowingly obtain[ing] any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." The key element of fraud which "separates [it] from routine theft" is false pretense, such as "a subterfuge, ruse, trick, or dissimulation upon another." *State v. Johnson*, 179 Ariz. 375, 377, 378-79, 880 P.2d 132, 134, 135-36 (1994). Although false pretense "need not be by affirmative misrepresentation, it must be by more than the implied promise of honesty." *Id.* at 379, 880 P.2d at 136.

¶8 Mapes asserts "the State presented no evidence that [he had] used a false pretense in order to take the cars," because he had provided valid identification and accurate contact information, or at least had given no false information. Citing *Johnson*, 179 Ariz. at 379, 880 P.2d at 136, Mapes contends that merely representing himself as an interested buyer to gain the trust of the salesmen and then betraying that trust "does not support the misrepresentation element of fraud." He argues that in the May incident, the salesman gave him permission to drive the vehicle and never placed a limit on how long he could keep it. As to the November incidents, he claims that, because the salesmen did

not give him permission to drive the vehicles, he did not use a false pretense to obtain the benefit. *See id.* at 378, 880 P.2d at 135 ("The statute's language means that the false pretense must actually cause the victim to rely and, as a result, give property or money to the defendant."). The state argues that Mapes obtained access to the vehicles by representing himself as an interested buyer without telling the salesmen that he was going to take the vehicles without permission or fail to return them.

¶9 The facts here are distinguishable from those in *Johnson*. In that case, the defendant had used gasoline cards his employer had supplied for company vehicles to obtain gasoline for non-company vehicles, but he had not induced the employer to give him the cards "by misrepresenting or concealing his true intent." *Id.* at 379, 880 P.2d at 136. Rather, he had merely exploited his employer's trust. Here, as the state points out, Mapes presented himself as a potential buyer so he could gain access to vehicles, which he did not intend to buy. His representation induced the salesmen to unlock vehicles and start the engines. From this evidence, jurors could reasonably conclude that Mapes had obtained the vehicles through a false pretense. The trial court properly denied Mapes's motion for a judgment of acquittal on this charge.

Jury Instructions

¶10 Mapes next contends the trial court improperly instructed the jury on the lesser-included offense of unlawful use of means of transportation. Both parties agreed that an instruction on unlawful use of means of transportation, a lesser-included offense of theft, was appropriate. In fact, Mapes requested an instruction that read, in pertinent part: "The elements of the offense of unlawful use of means of transportation are: (1)

without intent to permanently deprive, (2) a person . . . knowingly takes unauthorized control over another person's means of transportation . . . ."

¶11 If we determine that Mapes invited the alleged error by requesting this instruction, he has no available remedy. *See State v. Lucero*, 223 Ariz. 129, ¶ 12, 220 P.3d 249, 254 (App. 2009). If the error was not invited, we review only for fundamental, prejudicial error because Mapes failed to object to the instruction. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶12 The court gave the following instruction over the state's objection:

> The crime of theft of means of transportation includes by definition the less serious offense of unlawful use of means of transportation. The crime of unlawful use of means of transportation requires proof of the following two things:
>
> 1. The defendant knowingly and without lawful authority controlled the motor vehicle of another person; **and**
>
> 2. The defendant did so without the intent to permanently deprive the owner.

(Emphasis added.)

¶13 The state objected to the instruction on the ground that it made the second requirement appear to be an element of the offense that the state had the burden to prove. Mapes did not join in the objection. But both parties acknowledged that the state was not required to prove the defendant's lack of intent to permanently deprive the owner of property for a conviction of the offense of unlawful use of a means of transportation. *State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995) ("'Without intent to permanently deprive' is simply included in the statute to distinguish unlawful use from

auto theft."). The trial court agreed the defendant's lack of intent to permanently deprive the owner was not an element, but overruled the state's objection. It noted that the instruction's language was the same as the statute, that it helped to clarify, and that it was unlikely to prejudice the state or confuse the jury.

¶14 Assuming the instruction was erroneous because it required the state to prove a lack of intent to permanently deprive, Mapes invited the error by requesting a substantially similar instruction. Although he asserts that his proposed instruction "did not specify that this lack of intent had to be proven, as the trial court's instruction did," and that the proposed instruction cited *Kamai*, these minor distinctions do not alter the fact that Mapes requested an instruction that stated a lack of intent to permanently deprive the owner was an element of the lesser-included offense. Because Mapes invited error by requesting this instruction, he is precluded from relief on appeal. *See State v. Logan*, 200 Ariz. 564, ¶ 15, 30 P.3d 631, 633-34 (2001) (invited error doctrine barred defendant from claiming as error a jury instruction he had requested).

¶15 Mapes next contends an instruction to the jury on the fraudulent scheme and artifice charge denied him the right to a unanimous verdict. Because Mapes failed to raise this issue before the trial court, he has forfeited his objection absent fundamental error.[1] *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

[1]The state asserts Mapes failed to timely object to the alleged duplicity in the indictment and thus forfeited his rights to have the issue reviewed on appeal. *See* Ariz. R. Crim. P. 13.5(e) ("No issue concerning a defect in the charging document shall be raised other than by a [pretrial] motion filed in accordance with Rule 16."). Indeed, although Mapes moved to sever the counts in his indictment in October 2008, he never moved to dismiss the indictment for duplicity. *See State v. Delgado*, 174 Ariz. 252, 255,

¶16 A defendant has the right to a unanimous jury verdict in a criminal case. Ariz. Const. art. II, § 23. "A violation of that right constitutes fundamental error." *State v. Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d 64, 77 (2003). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail on fundamental error review, Mapes must establish that fundamental error exists and that the error caused him prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Mapes argues the state presented evidence of three separate incidents that each "constituted a separate alleged criminal act." Because jurors were not instructed they had to agree on the act that constituted the offense, "the jury's verdict for count four could have been non-unanimous."

¶17 In count four, Mapes was charged with fraudulent schemes and artifices. Section 13-2310(A), A.R.S., provides: "Any person who, pursuant to a scheme or

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848 P.2d 337, 340 (App. 1993) (defendant failed to timely challenge defect in indictment where defect easily could have been discovered through reasonable diligence prior to trial); *State v. Puryear*, 121 Ariz. 359, 362, 590 P.2d 475, 478 (App. 1979) (challenge made after opening statement to specificity of indictment not timely because defendant received pre-trial disclosure of prosecution's case and defect could have been noticed by defendant before trial). The state maintains Mapes has waived even fundamental error review because he was aware throughout pretrial litigation and trial that the state was accusing him of three transactions in furtherance of one scheme. In *State v. Urquidez*, 213 Ariz. 50, 138 P.3d 1177 (App. 2006), this court noted our supreme court had recently suggested, but did not "expressly" conclude, that "unpreserved claims of error concerning a defect in the charging document might not be subject to review of any kind." *Id.* ¶ 4, *citing State v. Anderson*, 210 Ariz. 327, ¶¶ 13-20, 111 P.3d 369, 377-79 (2005). However, we note the error Mapes asserted goes primarily to the lack of curative instructions for the jury, not to the indictment on its face; we therefore address only whether the trial court fundamentally erred in its instructions to the jury.

artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony." Such a scheme or artifice to defraud "implies a plan, and numerous acts may be committed in furtherance of that plan." *State v. Suarez*, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983).

¶18 Curative measures are unnecessary if the separate acts presented by the state are part of a single criminal transaction.[2] *State v. Klokic*, 219 Ariz. 241, ¶ 15, 196 P.3d 844, 847 (App. 2008). And, as "our supreme court has stated, '[a]lthough a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.'" *State v. Ramsey*, 211 Ariz. 529, ¶ 18, 124 P.3d 756, 763 (App. 2005), *quoting State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (alteration and citation omitted in *Ramsey*). Here, Mapes's scheme or plan was to represent himself falsely as an interested buyer at various car dealerships to obtain access to vehicles. To convict on this charge, the jurors had to agree that Mapes had formed a plan and had obtained some benefit pursuant to that plan by using false pretenses or making false representations or promises. They did not have to agree as to the means by which Mapes executed his scheme. *See id.*

[2]This court has ruled that "[a] continuing scheme or course of conduct may properly be alleged in a single count." *Ramsey*, 211 Ariz. 529, ¶ 12, 124 P.3d at 761, *citing State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985) ("'[W]here numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper.'") (alterations in *Ramsey*).

¶19 Mapes argues, however, that "the instructions improperly allowed the jury to convict if it found [he] had obtained any benefit pursuant to any scheme to defraud any of the three alleged victims," rather than finding one overall scheme. But the prosecutor argued to the jury that the charge involved one scheme which had been executed on three occasions. We may consider the jury instructions in conjunction with the closing arguments of counsel. *State v. Valverde*, 220 Ariz. 582, ¶ 16, 208 P.3d 233, 237, *cert. denied*, ___ U.S. ___, 130 S. Ct. 640 (2009); *see also State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions."). We therefore conclude the trial court did not err in instructing the jury.

¶20 Finally, Mapes contends the trial court's jury instruction on the state's burden of proof, which was consistent with our supreme court's directive in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), resulted in structural error that lessened the state's burden of proof, shifting it to him, and thereby violating his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as by article II, §§ 4, 23 and 24 of the Arizona Constitution. He also contends the instruction "improperly mandated that the jury convict if it found the State had proven its case beyond a reasonable doubt," thus invading the province of the jury.

¶21 Our supreme court recently has "'reaffirmed a preference for the *Portillo* instruction' and rejected the invitation to revisit *Portillo.*" *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007), *quoting State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006). "[W]e are bound by decisions of the Arizona Supreme Court and

have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Consequently, we do not address this argument further.

Disposition

¶22 Mapes's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge